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NO. 1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

TEX TAN WELHAUSEN COMPANY AND
TEX TAN WESTERN LEATHER COMPANY, DIVISION
OF TANDY CORPORATION,
Petitioner

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO,
Intervenor-Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Supplement to Petition for Writ of Certiorari

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Supplement to Petition for Writ of Certiorari

This supplement to the petition for certiorari filed herein on March 18, 1971, is filed to direct attention to error in the Brief in Opposition filed by respondent union on April 16, 1971.

1. Recognizing that a finding in the Board's Decision that the company intended to enter into a contract with the union is fatal in the conclusion that the company generally violated Section 8(a)(5) and fatal to any contention that this is a "surface bargaining" case, counsel for the union desperately seek to explain away the Board finding that the General Counsel in the complaint did not intend to, and did not allege "the absence of intent to enter into any contract at all." (A144)

The contradiction which the Board Decision is attempting to explain refers to the two (and only) general Section 8(a)(5) allegations in the complaint. These are: 13(a) which alleges that "commencing on or about May 10, 1965, (the date of the expiration of the old contract), and continuing to date, Respondent has negotiated with the union in bad faith with no intention of entering into any final or binding collective bargaining agreement," and 13(b) which alleges "on or about May 10, 1965, Respondent refused to consider any proposal other than an extention of the terms and conditions of the expiring contract." (VI 2661)

The Decision finds that paragraph 13(a) of the complaint was not to be taken literally and did not mean what it says and that no contention was ever made that the company did not intend to enter into a contract with the union. (In something less than fairness and frankness with the court, counsel in quoting from the Decision omits the reference in the Decision to the contradiction of paragraph 13(a) by paragraph 13(b).

(As pointed out in the Petition (footnote 2) (and not denied in the Brief in Opposition) in oral argument in the court below, Board counsel admitted that the Board found the company intended to contract.)

The Board Decision deals with the further contradiction between paragraph 13(a) of the complaint and the undisputed fact that on July 28, 1965, the company sub-

mitted to the union a complete contract proposal ready for signature. The Board disposes of this contradiction by stating that the company's proposed collective bargaining agreement "was the old contract with no changes of substance." (A144) In other words, the contract which the company was willing to sign did not include enough concessions.

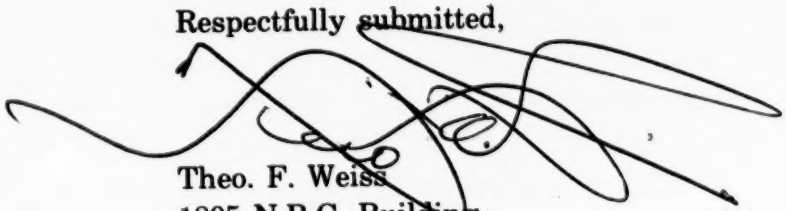
Thus it is obvious that contrary to counsel's statement, this is not "a conventional failure to bargain case," but rather a case in which the Board Decision includes a finding that the company did in fact intend to enter into a contract with the union. The "bad faith *approach*" upon which the Board relies is not an approach to avoid a contract, but rather an approach on the part of the company to obtain the contract which it deemed advisable.

2. Contrary to counsel, the matter of whether the strike was caused by unfair labor practices, does not turn on fact issues, but rather upon the legal question of whether a conclusion can stand that a strike was caused by alleged unfair labor practices, which under *Porter* were not violations of the Act. In reaching its conclusion, the Board referred to the company's adherence to its position on contract provisions, its failure to make concessions and *to the very matters which form the basis for paragraphs 1(a), (b), and (d) of the Order, which have been struck down.* (A145) In accepting the union representative's legal conclusions as to the company's obligations, the Board adopted a legal position which is in conflict with *Porter.*

3. Finally, on the matter of eligibility for vacations, the company adhered strictly to a plan established by the company *and the union* in the old contract several years before the strike. Unlike Great Dane Trailers, Inc., it did not establish a *new* plan *after* the strike had started. Section 10 of Article VI of the expired contract disqualified or reduced vacation benefits for all employees who had had

extended absences *for any reason* during the vacation year. The Decision establishes that the union sought unsuccessfully to eliminate Section 10 during the negotiations. Despite the fact that under the Board's established *General Electric Rule* (affirmed a number of times since *Great Dane*) that such a provision is entirely legal, paragraph 2(f) of the Board Decision orders the company to make a concession to the union in the elimination of Section 10 and to change its contract proposal retroactively, which obviously violates *Porter.*

Respectfully submitted,



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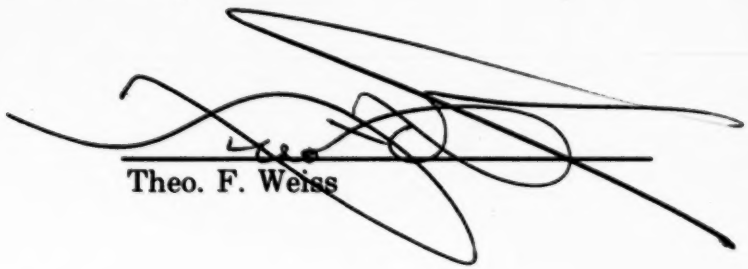
Of Counsel:

Clemens, Knight, Weiss & Spencer

April, 1971

Certificate of Service

A true copy of the foregoing supplement to Petition for Writ of Certiorari has been forwarded by certified air mail to Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Penn 17 Building, Washington, D.C., to L.N.D. Wells, Jr., 1601 National Bankers Life Building, Dallas, Texas, Attorney for Intervenor, and to the Solicitor General, Washington, D.C. on this the 21 day of April, 1971.



Theo. F. Weiss